In the

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-887

AMERICAN PARTY OF TEXAS, et al,

Appellants,

v.

BOB BULLOCK, Secretary of State of Texas,

Appellee.

Appeal from the United States District Court for the Western District of Texas

BRIEF FOR APPELLANTS TEXAS NEW PARTY AND TEXAS SOCIALIST WORKERS PARTY

MICHAEL ANTHONY MANESS,
711 Main Street, Suite 700,
Houston, Texas 77002,
(713) 229-8681,

GERALD M. BIRNBERG,
2020 Southwest Freeway, Suite 302,
Houston, Texas 77006,
(713) 529-7648,
Counsel for the Texas New Party and Texas Socialist Workers Party

May 1973

Jurisdictional Statement Filed December 15, 1972
Probable Jurisdiction Noted March 5, 1973

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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BRIEF FOR APPELLANTS TEXAS NEW PARTY AND TEXAS SOCIALIST WORKERS PARTY

OPINION BELOW

The memorandum opinion of the District Court is reported as *Raza Unida Party v. Bullock*, 349 F. Supp. 1272 (W.D. Tex., 1972) and is reproduced in the Jurisdictional Statement of the Appellants at pages 17-36.

JURISDICTION

The District Court's opinion and judgment were rendered on September 15, 1972. Timely notices of appeal were thereafter filed on behalf of the Appellants, and a consolidated Jurisdictional Statement invoking the jurisdiction of the Court

pursuant to 28 U.S.C. § 1253 was filed on December 15, 1972. The Court noted probable jurisdiction of the appeal on March 5, 1973 and consolidated the case for oral argument with No. 72-942, *Hainsworth v. Bullock*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the pertinent provisions of the Texas Election Code, Tex. Rev. Civ. Stat. Ann. Arts. 13.02, 13.03, 13.12, 13.45, 13.47, and 13.47a (1967), as amended [hereinafter cited as Texas Election Code or merely by article number] are reproduced in the Appendix at pages 44-48.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the totality of the general election ballot certification requirements imposed on minority political parties by the Texas Election Code, including provisions forcing such parties to obtain the notarized signatures of approximately 22,000 registered voters who have not previously participated during the same election year in a major party primary election or nominating convention, but limiting the time for obtaining such signatures to a period of approximately 55 days following the major party primary elections, and further requiring that a candidate formally file for office approximately nine months before the general election and approximately three months before the primary elections, abridges the rights of free association, liberty, due process and equal protection guaranteed by the First and Fourteenth Amendments.

2. Whether a State election law prohibiting minority political parties from circulating nominating petitions for the general election until after the major party primary elections, and further providing that a voter who has previously participated in a major party's primary election or nominating convention is thereafter ineligible to sign a minority party nominating petition during the same election year, abridges the rights of free expression, association and liberty guaranteed by the First and Fourteenth Amendments.

STATEMENT OF THE CASE

This is a direct appeal from a final order entered on September 15, 1972 by a Three-Judge Federal District Court, which dismissed four consolidated class actions seeking declaratory and injunctive relief against certain provisions of the Texas Election Code and related Texas election laws. The Plaintiffs were various minority political parties, their candidates for public office, individuals seeking office as independent candidates, and qualified Texas electors desiring to vote for these candidates.

The suits were instituted under the Civil Rights Acts of 1870 and 1871, 42 U.S.C. § 1981 and § 1983, the Voting Rights Act of 1965, 42 U.S.C. § 1971, and the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States. Jurisdiction in the District Court was conferred by 28 U.S.C. § 1343. Because each of the four complaints sought an injunction against Texas statutes of statewide application, and because each action involved essentially identical issues and claims for basically the same relief, the Chief Judge of the United States Court of Appeals for the Fifth Circuit entered

an order on July 28, 1972, convening the statutory Three-Judge District Court prescribed by 28 U.S.C. § 2281 and consolidating the four cases for hearing and determination (R. 9, 11).

Each of the Plaintiff minority political parties (La Raza Unida, American Party of Texas, Texas New Party and Texas Socialist Workers Party) challenged the constitutionality of Art. 13.45(2) of the Texas Election Code, which sets forth the requirements which a new or minority party must meet in order to have the names of its nominees for public office printed on the State's general election ballot.[1] Under Texas law, any political party whose candidate for Governor in the last preceding general election polled at least 200,000 votes statewide is required to nominate its candidates for the succeeding general election by means of a party primary financed entirely by State funds.[2] A party whose candidate for Governor in the last preceding general election polled at least two per cent of the total votes cast for that office but less than 200,000 votes has the option of nominating its candidates either by means of a State-financed primary election or through party nominating conventions.[3] The names of candidates nominated by

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[1] The District Court dismissed the complaints of La Raza Unida and the Texas Socialist Workers Party, concluding that these Plaintiffs lacked standing because they had successfully complied with the statutory provisions in question and had been certified for a place on the general election ballot by the Texas Secretary of State on August 8, 1972. 349 F. Supp. at 1276. However, since neither the American Party nor the Texas New Party was certified because of their failure to meet the requirements imposed by Art. 13.45(2), the constitutional issues are properly before the Court for review. *Bullock v. Carter*, 405 U.S. 134, 136, n. 2, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).

[2] Arts. 13.02, 13.03.

[3] Art. 13.45(1).

political parties falling within either of these categories are automatically placed on the Texas general election ballot.

On the other hand, a party whose candidate for Governor in the last preceding general election polled less than two per cent of the total votes cast for that office, or any new party, or any previously existing party which did not nominate a candidate for Governor in the last preceding general election, *must* nominate its candidates by party conventions and *must* satisfy the conditions imposed by Art. 13.45(2) in order to have the names of its candidates printed on the general election ballot. Since none of the Plaintiff minority political parties were eligible to nominate their candidates by primary elections in 1972, and since none of them will be entitled to conduct primaries prior to the next general election in 1974, their only available alternative for having the names of their candidates printed on the general election ballot was and will be for them to comply with the requirements of Art. 13.45(2).

Art. 13.45(2) imposes upon minority political parties the following conditions and restrictions:

(i) Each minority party must hold precinct, county, district and state nominating conventions on prescribed dates which coincide with the convention and primary election dates of established parties.[4] In addition, it must establish statewide party organizational machinery with a State executive committee and must also comply with requirements for declarations

[4] Precinct conventions for all political parties in Texas are held on the first Saturday in May, the date on which the major party primary elections are held. County conventions are held on the second Saturday in May; District conventions on the third Saturday in May; and State conventions on the second Saturday in June. Art. 13.03, 13.47.

of candidacy in February and the filing of party rules by March.

(ii) In order to have the names of its nominees printed on the general election ballot, a minority party must submit to the Texas Secretary of State a certified list, by precinct, containing the names, street or post office addresses and voter registration certificate numbers of those individuals who participated in the party's precinct conventions. If the number of qualified voters attending the party's precinct conventions is less than one per cent of the total votes cast for Governor in the last preceding general election, the party must submit (in addition to its precinct convention attendance list) a petition signed by a sufficient number of additional qualified voters to constitute a total of at least one per cent of the total votes cast for Governor in the last preceding general election.

(iii) Every signature on a minority party's nominating petition must be signed under oath before a notary public [5] and must be accompanied by the voter's address and voter registration certificate number.

(iv) The nominating petition may not be circulated until *after* the date on which the major party primaries are held. All signatures collected before that time are void.

(v) No person may attend a minority party's nominating convention or sign its nominating petition if he has previously voted in any primary election or participated in any other party's convention during the same election year, on pain of criminal sanctions.

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[5] Tex. Rev. Civ. Stat. Art. 3945 provides that a notary public shall receive a fee of 50 cents for "administering an oath or affirmation with certificate and seal."

(vi) No person otherwise qualified to vote may attend a minority party's nominating convention or sign its nominating petition if he is not at that time registered to vote.

(vii) The precinct convention attendance list and petition must be filed with the Texas Secretary of State within approximately 55 days[6] following the major party primaries, which is approximately four months before the general election.

Art. 13.47a(1) of the Texas Election Code further requires that an individual seeking nomination as a minority party candidate must declare his candidacy before 6 p.m. on the first Monday in February of an election year, approximately three months before the party primaries and conventions and approximately nine months before the general election. This requirement is identical to that imposed upon prospective candidates for a major party nomination by Art. 13.12.

However, unlike the established political parties, minority parties are provided with no State financial assistance whatever to help defray the expenses of nomination and ballot certification. Moreover, minority parties are not provided with any alternative equivalent to the absentee balloting authorized in party primary elections by Art. 5.05, by means of which such parties are afforded approximately three weeks before the primaries and party conventions in which to gain electoral support from those who would otherwise be unavailable to participate.

In the 1968 Texas general election the presidential nominee of the American Party of Texas received more than 586,000

[6] The petition must be filed within 20 days following the State conventions, which must be held on the second Saturday in June. For the 1972 election year the deadline was June 30.

votes, approximately 25 per cent of the total number of votes cast. However, since the American Party did not nominate a gubernatorial candidate for the State's 1970 general election, it was subject to all of the preceding restrictions imposed on minority parties by the Texas Election Code in order to place its nominees on the 1972 general election ballot. Anticipating its inability to comply with these restrictions, the Party filed the present action in May of 1972, seeking a declaration of the invalidity of the Texas minority party candidacy requirements and an injunction against their enforcement.

Shortly thereafter, the Texas New Party and Texas Socialist Workers Party filed a similar action challenging the application of the foregoing provisions of the Texas Election Code to either party in any future election. At approximately the same time Laurel Dunn, an independent candidate for the United States House of Representatives, filed suit in his own behalf in an effort to invalidate the Texas restrictions on independent candidacy. These three cases, together with an earlier action filed by La Raza Unida, were thereafter consolidated and tried together on September 7, 1972.

After initially determining that the fundamental nature of the political rights involved demanded "exacting scrutiny" of the challenged statutory restrictions under the First Amendment, and that the validity of the enactments under the Fourteenth Amendment depended upon whether they were necessary to accomplish a "compelling State interest", the District Court upheld the laws in question and denied all relief.[7]

[7] Pending a determination of the merits, the District Court had temporarily restrained the Texas Secretary of State from refusing to accept any signatures gathered on nominating petitions by La Raza Unida and the American Party between June 30, 1972 and September 1, 1972. In

With respect to the organizational requirements imposed upon minority parties, the Court determined that the impedence of access to the ballot was offset by what it characterized as the "lenient" one per cent petition requirement and that the totality of the restrictions imposed were constitutionally permissible under the decisions in *Williams v. Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) and *Jenness v. Fortson,* 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971):

> "Following the *Jenness* command to look to the 'totality' of the state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible." 349 F. Supp. at 1279.

With regard to the prohibition against circulation of a minority party nominating petition before the major party primary elections, the Court determined that the requirement was a legitimate exercise of State authority because advance circulation of nominating petitions might preclude an early signer from changing his mind and participating in a major party primary election or convention. This provision was also upheld as a reasonable means of reducing the likelihood that "individual voters will become confused or engage in the party process of more than one party." 349 F. Supp. at 1280.

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the order of dismissal entered on September 15, the Court dissolved the restraining order and declared all such signatures to be null and void. 349 F. Supp. at 1286.

The American Party then sought emergency relief from this Court in an effort to secure a position on the 1972 Texas general election ballot. Its motion for a temporary restraining order against the enforcement of Art. 13.45(2) was denied by the Court on October 5, 1972, Mr. Justice Douglas dissenting. *American Party of Texas v. Bullock,* 409 U.S. 803, 93 S. Ct. 25, 34 L. Ed. 2d 63 (1972).

The requirement that signatures on nominating petitions be notarized was approved by the District Court for want of a feasible alternative method for enforcing criminal sanctions against participation in the political activities of more than one party in any given election year.

The 55-day time restriction for collecting signatures on nominating petitions was justified on the grounds that a minority party's failure to obtain the necessary number was indicative of a lack of political support or initiative, while the time limitations regarding declarations of candidacy were upheld on the theory that they applied uniformly to majority and minority party candidates alike.

Finally, with respect to the alleged disparity resulting from absentee balloting for party primary elections and the absence of an equivalent opportunity for minority parties to secure an irrevocable electoral commitment before the primaries and conventions, the Court concluded that the "exacting scrutiny" applied to voting restrictions generally was inapplicable to absentee balloting under the decision in *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) and that more traditional Fourteenth Amendment principles sanctioned the difference in treatment:

> "Although the State of Texas does not offer any reasons for the lack of a provision allowing voters to cast absentee ballots for minority party candidates and independents, 'Legislatures are presumed to have acted constitutionally * * * '." 349 F. Supp. at 1283.

Although several other claims were raised by the Plaintiffs in connection with the alleged unconstitutionality of age and residency requirements imposed on all candidates by the Texas

Election Code, these contentions were not among those set forth in the Jurisdictional Statement and are therefore not now before the Court for consideration.

SUMMARY OF THE ARGUMENT

The crux of the problem presented by this appeal is whether the totality of the restrictions imposed on minority political candidacy by the challenged provisions of the Texas Election Code constitutes an impermissibly complicated, time-consuming, expensive and invidiously discriminatory burden on such candidacy in contravention of the First and Fourteenth Amendments. Barriers to effective political participation are of obviously crucial constitutional significance, not simply because of their relevance to future organized efforts to cultivate a climate of ideological heterodoxy in a State government dominated since the days of Reconstruction by a single monolithic party, but also because they implicate the whole spectrum of basic political values traditionally recognized as essential to the proper functioning of our system of representative democracy. "Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." *Williams v. Rhodes*, 393 U.S. at 39 (concurring opinion by Mr. Justice Douglas).

In both *Williams* and *Jenness v. Fortson* the Court was confronted with State election laws under which minority party and independent candidates for public office, in order to secure a position on the ballot, were required to fulfill requirements materially different from those imposed on the candidates of established political parties. The first case involved extraordi-

narily stringent Ohio enactments that in their practical effect excluded all but the major political parties from effective electoral participation, while the second dealt with a relatively liberal Georgia statutory system under which majority and minority party candidates competed on more or less equal terms for ballot position. Thus, while in *Williams* the Court held that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights [amounting to] an invidious discrimination, in violation of the Equal Protection Clause" of the Fourteenth Amendment, 393 U.S. at 34, in *Jenness* the Court found that there had been no discrimination at all, invidious or otherwise, because the State of Georgia had merely provided "two alternative paths [to candidacy], neither of which can be assumed to be inherently more burdensome than the other." 403 U.S. at 441.

As the District Court correctly recognized, "this case presents a new combination which falls squarely in the middle" between the extremes considered in *Williams* and *Jenness*. 349 F. Supp. at 1276. However, it then went on to evaluate the claimed infirmities in the Texas system, not in terms of their total impact on minority political participation in relation to its relative ease or difficulty when compared with the nominating procedures of the established parties, but according to whether any of the *specific* requirements imposed on minority parties and candidates by the Texas Election Code, considered individually and in the abstract, were in and of themselves sufficiently onerous to justify judicial invalidation. Not surprisingly, the District Court then concluded that because each impediment to candidacy had been found to be constitutionally supportable the entirety of the Texas scheme was likewise valid.

Needless to say, this is not the analytical approach mandated by the Court's previous decisions in *Williams* and *Jenness*. In order to correctly appraise the constitutional vitality of the alternative route to candidacy which Texas has provided for minority parties, it is necessary to determine whether all of the statutory obstacles, considered together, impose a substantially greater handicap on the aspiring minority party and its candidates than the equivalent restrictions impressed on established parties and their candidates. If, as alleged, an obviously significant disparity in treatment exists — that is, if the Democratic and Republican Parties are permitted to field a slate of candidates in the general election through nominating procedures that are intrinsically less rigorous than those afforded to the Appellants — and if the State is unable to demonstrate that the totality of the discriminatory burdens imposed is *necessary* to accomplish a compelling State interest, the Texas system is constitutionally infirm and must be supplanted by alternative methods that will preserve the State's legitimate interests in limiting ballot positions to bona fide parties and candidates without simultaneously effectuating virtually absolute major party hegemony that strangles emergent political parties in the crib.

Significantly, the District Court apparently twice misperceived the appropriate constitutional standard in concluding that "the totality of the Texas Election Code *serves* a compelling State interest and does not operate to *suffocate* the election process." 349 F. Supp. at 1276 (emphasis added). First, the determination that particular statutory restrictions on political candidacy actually serve to promote a compelling State interest is only one-half the inquiry; in addition, the Court must be

satisfied that the State has also demonstrated the *necessity* for such restrictions. *Kramer v. Union Free School District,* 395 U.S. 621, 627, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); *Dunn v. Blumstein,* 405 U.S. 330, 337, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). Second, none of this Court's previous decisions suggest that a State may throttle fundamental political rights in an invidiously discriminatory manner so long as it does not "suffocate" them. Phrased another way, there is no such thing as a *de minimus* constitutional violation.

In any event, the Appellants have assaulted the Texas Election Code on two major fronts. First, they assert that the totality of the general election ballot certification requirements applicable to them is both an abridgement of their right to effective political association under the First Amendment and an invidious discrimination against minority party candidacy in violation of the Fourteenth Amendment. The "totality" of the relevant restrictions includes:

(i) exceptionally burdensome and overly technical party organizational requirements which necessitate the holding of precinct, county, district and state nominating conventions on dates coinciding with the convention and primary election days of the established political parties;

(ii) the submission to the Texas Secretary of State of the signatures, addresses and voter registration certificate numbers of approximately 22,000 voters who desire that the names of minority party candidates be printed on the general election ballot;

(iii) an absolute prohibition, supplanted by criminal sanctions, against signing a nominating petition if the individual

has voted in any primary election or participated in any convention of any other political party during the same election year;

(iv) a requirement that all nominating petitions be signed under oath before a notary public;

(v) the exclusion of unregistered but otherwise qualified voters from the pool of available signatories to a nominating petition;

(vi) a flat prohibition against the circulation of all nominating petitions until *after* the date on which the major party primaries are held;

(vii) a limitation on the time period during which nominating petitions may be circulated to a period of approximately 55 days following the major party primaries and approximately four months before the general election;

(viii) a mandatory declaration of candidacy approximately three months before the primary elections and approximately nine months before the general election;

(ix) the exclusion of minority parties from access to public funds appropriated by the State for the purpose of financing the primary elections of the established political parties, and

(x) a total failure to afford the minority party any substantial equivalent to the absentee primary balloting allowed to the major parties, as a result of which they are permitted approximately three weeks to secure an irrevocable commitment from a substantial portion of the Texas electorate.

Second, apart from its role as part of the "totality" of inhibitory features of the Texas Election Code, the prohibition

against voting in a primary election and thereafter signing a nominating petition is, in and of itself, an impermissible abridgement of the rights of free expression and association guaranteed by the First and Fourteenth Amendments. Certainly the State has a legitimate interest in preserving the integrity of a political party's nominating procedures against coordinated efforts to subvert them; to this extent, restrictions against cross-over voting in primary elections and dual or multiple participation in party conventions are obviously justified as legitimate methods for counteracting "raiding" and similar practices aimed at weakening an opposition party. But the critical fact is that under the Texas system a signature on a nominating petition is in no sense equivalent to a primary "vote" for a particular candidate or slate of candidates, since the conventions rather than the signatures determine whom a minority party's nominees will be. Nominating petitions thus do no more than determine who will be on the ballot; because signing one cannot exclude an otherwise viable candidate from effective political participation, the dangers implicit in cross-over voting and "raiding" of competing party primaries are nonexistent.

Moreover, because Texas has never attempted to promote party solidarity to the extent of limiting a voter's options in the general election to those candidates nominated by the political party in whose primary he voted, there is no conceivable justification in requiring a registered Democrat or Republican to participate in nominating only his party's candidates and no one else. By demanding that the members of an established party confine themselves to the nomination of party candidates, the State has clearly limited the individual's freedom of choice to one conglomerate of nominees, a course of action manifestly

antithetical to the ideological diversity encouraged and protected by the First Amendment.

In each of the foregoing respects the Texas Election Code is constitutionally infirm. The holdings of the District Court to the contrary should be reversed.

ARGUMENT

1. The totality of the general election ballot certification requirements imposed on minority political parties by the Texas Election Code abridges the rights of free association, liberty, due process and equal protection guaranteed by the First and Fourteenth Amendments.

An assessment of the validity of Texas' restrictions on minority party candidacy within the context of the First and Fourteenth Amendments necessarily entails accommodation of the competing individual and governmental interests implicated by the State's electoral processes. On the one hand, there is "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams v. Rhodes,* 393 U.S. at 30. On the other hand, "preservation of the integrity of the electoral process is [also] a legitimate and valid state goal," *Rosario v. Rockefeller,* 41 U.S.L.W. 4401, 4404, March 20, 1973, as is the "legitimate interest in regulating the number of candidates on the ballot." *Bullock v. Carter,* 405 U.S. 134, 145, 92 S. Ct. 849, 31 L. Ed. 2d (1972). Plainly the problem is to balance these frequently conflicting political values in a manner that will, insofar as possible, maintain each of them intact.

Even so, as the District Court correctly held, it is quite apparent at this stage in the evolutionary development of our constitutional history that the balance must be weighted heavily in favor of individual freedom of choice. Since "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. at 336, State laws that taken as a whole impose substantially greater handicaps on certain classes of political candidates almost invariably intrude upon fundamental rights because such disparity in treatment has "a real and appreciable impact on the exercise of the franchise" as the direct consequence of its "patently exclusionary character." *Bullock v. Carter*, 405 U.S. at 143-44. Consequently, the totality of such restrictive laws must be viewed in terms of the familiar principle that an "exacting standard of precision [is required] of statutes affecting constitutional rights." *Dunn v. Blumstein*, 405 U.S. at 360; *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966). Even though such statutes are reasonably related to the accomplishment of some legitimate State interest, they will nevertheless fail to pass constitutional muster unless they are also "*necessary* to promote a *compelling* governmental interest." *Shapiro v. Thompson*, 394 U.S. at 634 (emphasis added); *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).

Obviously the Appellants here do not contend that the

objectives ostensibly sought to be achieved by the challenged provisions of the Texas Election Code do not constitute compelling State interests. Rather, their position is that "there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity" and that the State of Texas therefore "may not choose the way of greater interference" in light of these available alternatives. *Dunn v. Blumstein*, 405 U.S. at 343.

Williams v. Rhodes is itself a classic illustration of the precept that State regulatory effort impinging upon basic individual rights can be justified only upon a showing by the State that its restrictions are necessary to accomplish a compelling State interest:

> "No extended discussion is required to establish that the Ohio laws before us give the two old, established parties *a decided advantage* over any new parties struggling for existence and thus place *substantially unequal burdens* on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote can be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place *such unequal burdens* on minority groups when rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' (citation omitted)." 395 U.S. at 31 (emphasis added).

The preceding quotation suggests two considerations of de-

cisive importance to the disposition of these cases. First, the primary emphasis in *Williams* was not upon the burdensome or restrictive character of the Ohio election laws in any abstract sense but rather upon the *comparative* inequality between majority and minority political parties that resulted from them. Second, while the Court in *Williams* did point out that the practical effect of the Ohio enactments was to exclude all minority candidates from a place on the general election ballot, there was not the slightest suggestion that all discriminatory restrictions on candidacy may be automatically justified simply because some candidates or parties might somehow manage to comply with them.

The significance of a *comparative* analysis of the relative burdens imposed by State election laws on different classes of candidates was underscored by the Court's subsequent decision in *Jenness v. Fortson.* After examining the alternative routes to candidacy provided by Georgia law, the Court concluded that not only was minority candidacy encouraged by a number of procedures that had been absent in *Williams* (thereby precluding the assertion that the totality of the restrictions constituted an undue burden on the exercise of First Amendment rights) but also that the relative burdens of candidacy were more or less evenly distributed, although in a manner taking into account "obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." 403 U.S. at 1976. Thus, in a very real sense, *Jenness* posed no equal protection problem of the traditional variety at all, simply because the differences in treat-

ment accorded to different classes of individuals did not impose substantially greater hardships upon any particular class.[8] In the absence of any showing that some definable category of citizens suffers significantly more adverse consequences as the direct result of a particular legislative classification, there has been no "discrimination" of constitutional proportions despite superficial distinctions among individuals,[9] and thus the question of whether such "discrimination" is supportable by an appeal to any State interest is more or less academic.

Equally relevant in this regard are the Court's references in *Jenness v. Fortson* to the fact that the Georgia nominating procedures "do not operate to freeze the status quo." 403 U.S. at 438. Because both La Raza Unida and the Texas Socialist

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[8] "The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment * * * is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. *This is a premise that cannot be uncritically accepted.* * * * We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, *neither of which can be assumed to be inherently more burdensome than the other.*" *Jenness v. Fortson*, 403 U.S. at 440-41 (footnote omitted; emphasis added).

[9] The Court's previous decisions have clearly recognized the critical distinction between cases posing a traditional equal protection problem, in which State legislative classifications adversely affect the interests of discrete groups of individuals with identifiable common interests and characteristics, and those in which the law either does not effectuate a discernible classification, e.g., *Gordon v. Lance*, 403 U.S. 1, 5, 91 S. Ct. 1889, 29 L. Ed. 2d 273 (1971); *James v. Valtierra*, 402 U.S. 137, 142, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971); *Whitcomb v. Chavis*, 403 U.S. 124, 153, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971); *Palmer v. Thompson*, 403 U.S. 217, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971); cf. *San Antonio Independent School District v. Rodriguez*, 41 U.S. L.W. 4407, 4414, March 21, 1973, or imposes substantially equivalent benefits and burdens upon all classes, e.g., *Jenness v. Fortson, supra; McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807-08, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969); cf. *Britt v. North Carolina*, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

Workers Party had successfully complied with the qualifications for ballot position imposed by the Texas Election Code, the District Court implied that the restrictions did not manifest such a "freezing" effect and were therefore constitutional. 349 F. Supp. at 1281. However, metaphors and catchphrases plainly provide no satisfactory foundation for constitutional adjudication, particularly when they suggest that the totality of a State's discriminatory candidacy laws satisfies constitutional standards so long as at least one minority party or candidate is able to successfully comply with them. Nothing said or suggested in either *Williams* or *Jenness* supports an inference that only wholesale exclusion of such candidates from the ballot raises First or Fourteenth Amendment problems.

This is particularly obvious in light of the Court's characteristic description of statutes which on their face are so vague or overbroad that their language encompasses not merely conduct subject to legitimate proscription but also modes of expression and association protected by the First Amendment. The metaphor is similar; such statutes are said to generate a "chilling effect" on the exercise of constitutional rights. *Dombrowski v. Pfister,* 380 U.S. 479, 487, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965); *Zwickler v. Koota,* 389 U.S. 241, 252, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). Clearly such facially unconstitutional statutes do not necessarily impose an *absolute* prohibition on protected activities, despite the deterrent effect resulting from their very existence, yet it is precisely the fact of an unnecessary burden upon both unprotected conduct and rights of free expression and association that renders the legislation invalid, not its efficacy in effectuating total rather than

partial suppression of individual rights. Individuals challenging the facial constitutionality of State laws on First Amendment grounds thus need not first establish that as the result of such laws the exercise of their rights has been totally proscribed. It is enough to show that the impediments imposed by the State are greater than those essential to preserve its legitimate regulatory interests. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971); *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Baggett v. Bullit*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).

Likewise, within the context of the equal protection clause, the totality of a State's ballot certification requirements may abridge Fourteenth Amendment rights even though some minority parties or candidates have successfully overcome manifestly discriminatory burdens that have been placed upon them. The time, organizational effort and financial resources devoted by such parties or candidates to overcoming the established parties' initial advantage resulting from the comparative ease with which they attain ballot position have necessarily been lost when the time for serious campaigning arrives, leaving the minority candidate exhausted before the real race has even begun. Moreover, the fact that one party or candidate has been able to satisfy discriminatory nominating requirements bears no relation whatever to the ability of others in similar circumstances to comply, even though their claim to the status of bona fide contenders may be even more indisputable. While the

ability of some individuals or groups to satisfy allegedly unconstitutional restrictions on ballot position is perhaps one factor to be considered in assessing the "totality" of their impact, success in isolated instances or in one election year is obviously not determinative in and of itself.

The Court's recent decision in *Rosario v. Rockefeller*, 41 U.S.L.W. 4401, March 21, 1973, does not modify the established precept that a Plaintiff whose claims rest in part upon asserted equal protection grounds need not be subjected to "a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred." 41 U.S.L.W. at 4406 (dissenting opinion by Mr. Justice Powell). In upholding New York's requirement that a voter enroll in his chosen political party at least 30 days before the general election preceding the primary in which he wishes to vote, the Court simply recognized that the practical effect of such a time deadline was not to disenfranchise any voter; instead, it merely imposed upon all voters the identical, nondiscriminatory requirement of designating a party preference and permitted all voters to comply or not to comply as they so chose. Since nothing in the record suggested that inability rather than unwillingness to comply with State law was responsible for the Plaintiff's disenfranchisement, the Court concluded that the validity of the resultant classification of eligible and ineligible primary electors was to be determined according to traditional standards of "reasonableness" under the Fourteenth Amendment.

The situation is quite different, however, when the impact of particular ballot certification procedures falls with a dispropor-

tionately heavy hand upon minority political parties and their supporters. In these circumstances the State laws on their face treat different groups of people in singularly disparate ways. Whether the names of minority candidates appear on the general election ballot depends not upon a simple decision to register as a candidate but upon the party's ability to comply with procedures from which the candidates of established parties are exempted. Any minority party failing to comply with these procedures is absolutely excluded from a place on the ballot, regardless of what success others subjected to the same restrictions may enjoy. Thus, even assuming that the Texas Election Code may never exclude all minority candidates from the ballot in any given election year, its "patently exclusionary character," *Bullock v. Carter*, 405 U.S. at 144, is sufficient to require that the totality of its restrictions be tested according to the more rigorous equal protection standard, irrespective of whether they can be said to "freeze the status quo."

With respect to the claimed violation of First Amendment rights, the Texas system is concededly less stringent than that invalidated in *Williams v. Rhodes* insofar as the potential for effective political participation is greater. Likewise, there is little doubt that the totality of ballot restrictions imposed by Texas on minority candidacy is not quite so "invidiously discriminatory" as that disapproved in *Williams*, since some minority Texas parties have in fact surmounted the obstacles imposed. But there is little revelance in the supposition that Texas' scheme may be less unconstitutional than Ohio's was found to be. Rather, the important questions are (i) whether the barriers to minority political candidacy under Texas law are "inherently

more burdensome" than those governing established parties, and, if so, (ii) whether the obstacles are justified by the stringent test of necessity.

A side-by-side comparison of the Georgia procedures upheld in *Jenness* with the requirements set forth in the Texas Election Code is enough to establish their patent dissimilarity. Unlike Georgia, Texas imposes on minority parties the "Procrustean requirement" of establishing elaborate statewide party organizational machinery, entailing compliance with a multitude of administrative details commencing more than fourteen months before the general election. Precinct, county, district and State conventions must be held, even though the party's appeal "may be essentially to urban voters or to rural voters, as the case may be." *American Party of Texas v. Bullock, supra,* note 7 (dissenting opinion by Mr. Justice Douglas). Unlike Georgia, Texas limits the available pool of signatures for nominating petitions to those individuals who have not previously participated in another party's primary election or nominating convention. Unlike Georgia, which allowed approximately six months for securing signatures on nominating petitions, Texas limits the time in which such signatures must be collected to a period of roughly 55 days. Unlike Georgia, Texas requires that signatures on nominating petitions be obtained *after* the major party primary elections, at a time when the political interest of the general population is likely to be at a relatively low level. Unlike Georgia, Texas requires that all signatures on nominating petitions be notarized.

In short, there is simply no plausible foundation for any contention that Texas "imposes no suffocating restrictions what-

ever upon the free circulation of nominating petitions." *Jenness v. Fortson*, 403 U.S. at 438. On the contrary, it has obviously impressed a myriad of restrictions and conditions upon such petitions which, in their total impact on minority parties and their candidates, significantly impair the ability to organize an effectve political campaign because of the very real contingency that the requirements cannot be met. Insofar as a minority party must continually anticipate the possibility that all of its good-faith efforts to place a slate of candidates on the general election ballot may ultimately be wasted, the very existence of this plethora of impediments discourages new party organizational efforts and thereby limits the available channels for effective political participation. Absent some compelling justification for the totality of these requirements, they must fall under the First Amendment.

Moreover, although it is extraordinarily difficult to compare the relative burdens imposed on established and minority parties under Texas law, it is nevertheless clear that for all practical purposes both major parties will invariably be entitled to place the names of their candidates for office on the general election ballot, and that such candidates need only file for office and win a majority of the votes cast in the primary elections. On the other hand, minority parties and their candidates must meet, in addition to all of the conditions previously discussed, *identical* deadlines for declarations of candidacy,[10] and such candidates must likewise overcome the equivalent obstacle of gaining a majority of their party's votes at the nominating conventions. Given the realities of the situation, and the intuitive premise

[10] Compare Art. 13.12 with Art. 13.47a.

that the relative difficulty of obtaining party support as a prospective nominee does not depend upon whether that support must be obtained through a primary election or by means of a nominating convention, it is clear that the impediments to minority party candidacy imposed by the Texas Election Code are "inherently *more* burdensome" in the sense demanded by *Jenness v. Fortson*. To the extent that the totality of these requirements is not necessary to support a compelling State interest, the scheme plainly effectuates an impermissible invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment.

The District Court's failure to grasp the magnitude of the vice infecting the Texas system is perhaps more attributable to its piecemeal approach to the problem, coupled with a virtually myopic concentration on the percentage requirement for signatures on nominating petitions. Rather than recognizing the inescapable fact that minority party candidates and constituencies are subjected to substantially disproportionate burdens in their efforts to win a place on the general election ballot, the District Court instead viewed the problem in terms of whether the 1% requirement was, in some abstract sense, "constitutionally permissible." Finding that it was, after "balancing Texas' burdensome organization requirements against its lenient 1% petition requirement," 349 F. Supp. at 1279, the Court then went on to consider each of the additional restrictions imposed by Art. 13.45(2) and to hold each of them constitutional *in and of themselves*. No effort whatever was made to assess the impact of all restrictions in their "totality," nor was there any explanation offered to justify the implicit assumption that these additional restrictions were irrelevant to the ability to satisfy the percentage of signatures requirement.

Obviously the percentages involved are of little if any relevance when considered apart from the other factors which encourage or discourage the signing of nominating petitions. This critical fact has been consistently overlooked by the lower Federal courts in their efforts to appraise the "totality" of State-imposed restrictions on minority candidacy. Thus, virtually all opinions in the area focus an altogether disproportionate amount of attention on percentages, as if some more or less arbitrary fraction of votes in a preceding election (e.g., the 5% requirement upheld in *Jenness v. Fortson*) could somehow be set as a constitutional maximum. See, e.g., *People's Party v. Tucker*, 347 F. Supp. 1 (M.D.Pa., 1972) (upholding 2% of the largest vote cast for any candidate in the State as "reasonable" but invalidating requirement that signatures be collected during three-week period almost nine months before election); *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S. D. Ohio, E. D., 1970), *appeal dismissed sub nom. Gilligan v. Sweetenham*, 405 U.S. 949, 92 S. Ct. 1161, 31 L. Ed. 2d 227 (1972) and *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972) (invalidating 7% of vote cast for governor or presidential elector); *Baird v. Davoren*, 346 F. Supp. 515 (D. Mass., 1972) (upholding 3% of votes cast for governor); *Jones v. Hare*, 440 F. 2d 685 (6 Cir., 1971), *cert. denied sub. nom. Jones v. Austin*, 404 U.S. 911, 92 S. Ct. 237, 30 L. Ed. 2d 184 (1971) (upholding 1% of votes cast for successful candidate for Secretary of State); *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D.Ill., 1971), *affirmed*, 403 U.S. 925, 91 S. Ct. 2247, 29 L. Ed. 2d 705 (1971) (upholding 5% of votes cast for office sought); *Moore v. Board of Elections*, 319 F. Supp. 437 (D.C.D.C., 1970) (upholding 2% of all

registered voters or 5,000 signatures, whichever less); *Beller v. Kirk*, 328 F. Supp. 485 (S.D.Fla., 1970), *affirmed sub nom. Beller v. Askew*, 403 U.S. 925, 91 S. Ct. 2248, 29 L. Ed. 2d 705 (1971) (upholding 3% of total votes cast).

Plainly the arbitrary determination that some percentage requirements are inherently "reasonable" and others inherently "unreasonable" does not provide a suitable foundation for principled constitutional adjudication. Depending upon the other circumstances involved in any particular case, *any* percentage may be impermissible. For example, if a minority party could secure ballot certification only by collecting signatures on a nominating petition amounting to .00001% of the total votes cast for the office of governor in the last preceding general election, the deceptively low percentage requirement would be of little comfort if concomitant restrictions limited the time for collecting such signatures to the hours between 2 and 5 o'clock on the morning of April 1 and restricted the source of available signatories to those voters less than four feet tall. Percentages are significant *only* when they are considered in connection with the entirety of the other restrictions imposed on minority candidacy, and the entirety of such restrictions is in itself relevant *only* when viewed in terms of its comparative impact on the ability of minority parties and their adherents to organize successfully and to compete effectively with their established counterparts.

The conceptual sterility of any approach concentrating on percentages of signatures required for minority candidate nominating petitions, to the exclusion of the myriad of other factors affecting the probability that the percentage requirement can

actually be met, is demonstrated by the District Court's bald conclusion that, "although any percentage requirement is necessarily going to be arbitrary, 1% is a fair minimum to serve the state's compelling interest * * *." 349 F. Supp. at 1279. The question then becomes why 1% is necessarily "fair" and, more significantly, why any other percentage would not also be "fair" to promote the concededly compelling State interest of insuring that only bona fide candidates having some minimal degree of potential electoral support are ultimately given a place on the general election ballot. *Williams v. Rhodes,* 393 U.S. at 32; *Jenness v. Fortson,* 403 U.S. at 442. So long as the inquiry is directed only toward individual aspects of a State's nominating procedures, rather than toward the system taken as a whole, the question can never be satisfactorily answered. Indeed, appearing to recognize that each of the individual restrictions imposed on minority candidacy by the Texas Election Code is in no sense *essential* to the achievement of any legitimate governmental objective,[11] the District Court's opinion does not once evaluate any single restriction in terms of the test of *necessity* prescribed by *Williams v. Rhodes.*

The proper application of the analytical method dictated by *Williams* avoids these difficulties by considering the "totality" of the restrictions and their comparative impact on minority party

[11] "[T]he only legitimate interest the State may invoke in defense of [a] barrier to third-party candidacies is the fear that, without such a barrier, candidacies will proliferate in such numbers as to create a substantial risk of voter confusion." *Williams v. Rhodes,* 393 U.S. at 46 (concurring opinion by Mr. Justice Harlan). Preserving this interest plainly does not require elaborate party organizational requirements, notarized signatures on nominating petitions, or fixed percentages of signatures. Consequently, the District Court's technique has the anomolous effect of rendering *any* defense of State candidacy restrictions wellnigh impossible.

political participation. If the alternative routes to a place on the general election ballot entail substantially equivalent burdens for both minority party and established party candidates, the system as a whole will be upheld, even though the State might be unable to demonstrate that particular conditions for candidacy are necessary to promote a compelling State interest.[12] *Jenness v. Fortson, supra.* On the other hand, if the system as a whole imposes comparatively more onerous obstacles to minority candidacy, and if the totality of these restrictions creates manifestly serious barriers to effective exercise of associational rights protected by the First Amendment, the procedures adopted by the State can be sustained against constitutional assault only if they are demonstrably necessary to avoid the risk of a proliferation of candidates and the resultant danger of voter confusion. Clearly the "entangling web" of candidacy restrictions here is the spiritual kin of the scheme disapproved in *Williams v. Rhodes* and is easily distinguishable from the more or less neutral classification considered in *Jenness.* Given its essentially malignant character with respect to minority organizational efforts, the totality of the restrictions imposed by Art. 13.45(2) cannot be sustained in light of the available, less restrictive alternatives.

From the proper perspective it is plain that the Court need not determine whether all of the *individual* requirements for

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[12] Of course, specific statutory impediments to effective minority candidacy may by themselves effectuate such an obviously "real and appreciable impact on the exercise of the franchise," *Bullock v. Carter,* 405 U.S. at 144, that they must be closely scrutinized under the more stringent constitutional standard. Filing fees of the sort invalidated in *Bullock* are one example; prohibitions against signing a nominating petition after voting in a major party primary, discussed *infra,* are another.

ballot certification imposed on minority political parties by the Texas Election Code are all *individually* "necessary." Plainly none of them are, and the State need not affirmatively attempt the impossible task of demonstrating that every restriction is indispensible. But "[i]f, when the state's election laws are viewed *in their totality*, they restrict the rights of some groups to gain access to the ballot * * * some other nondiscriminatory 'compelling state interest' must be shown to justify such restraints." *Baird v. Davoren, supra*, 346 F. Supp. at 519 (emphasis added); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 989 (S.D.N.Y., 1970), *affirmed*, 400 U.S. 806, 91 S. Ct. 65, 27 L. Ed. 2d 38 (1970), *"Williams* teaches that a third party must have a *reasonable* opportunity to place its candidates on the ballot in a general election," *Barnhart v. Mandel*, 311 F. Supp. 814, 825 (D. Md., 1970) (emphasis added), and in the present context "reasonableness" can only be gauged in terms of a comparative analysis. Since in Texas the minority party and its candidates are subject to manifestly more stringent restriction on the whole than are the majority parties and their nominees for office, and since the alternative Texas routes to a position on the general election ballot thus place third-party candidates in an inherently less advantageous position, the entire system must necessarily fall because the legitimate State objectives which it seeks to accomplish could obviously be attained without the imposition of such relatively unequal burdens upon one discrete class of participants in the political process.

In short, although *Jenness v. Fortson* demands little more than comparatively equal opportunities for ballot position among all prospective candidates, the Texas Election Code has simply

failed to provide them. The totality of its discriminatory restrictions on minority party candidacy are accordingly unconstitutional under the First and Fourteenth Amendments.

2. The provisions of the Texas Election Code which prohibit minority political parties from circulating nominating petitions for the general election until after the major party primary elections, and which further prohibit a voter who has previously participated in a major party's primary election or nominating convention from thereafter signing a minority party's nominating petition during the same election year, abridge the rights of free expression, association and liberty guaranteed by the First and Fourteenth Amendments.

Unlike the Georgia nominating procedures upheld in *Jenness v. Fortson*, the Texas system incorporates a flat prohibition against voting in a major party primary election and thereafter signing a nominating petition for the purpose of placing the names of minority party candidates on the general election ballot. Apart from its role as one of the factors contributing to the invalidity of the totality of the Texas scheme, this restriction is, by itself, clearly violative of fundamental First Amendment freedoms.

It is axiomatic, of course, that "political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership." *Rosario v. Rockefeller*, 41 U.S.L.W. at 4406-07 (dissenting opinion by Mr. Justice Powell). Whatever the supposed long-term benefits thought to be gained by absolute party solidarity and unswerving across-the-board loyalty to the slate of candidates that ultimately emerges from the nominating process, the bulk of our citizenry has consistently declined to limit its allegiances, political participation and organizational efforts to so narrow an ambit. Ballots

are cast for individual candidates, not parties, and it is commonplace for a single voter's electoral preferences to be representative of a variety of parties and doctrines spanning the political spectrum from one extreme to the other. A refusal to confine the exercise of constitutional rights to the perimeters enclosed by a party platform is in no sense alien to our traditions; indeed, the Constitution encourages such ideological diversity, and it is far too late for the argument that the "liberty" of political association protected by the First and Fourteenth Amendments, *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), encompasses no more than the right to promote a single party's candidates. Absent some overriding State interest, any restriction of the individual's option to extend his support to a multiplicity of candidates and causes infringes upon his constitutionally protected rights.

Clearly the State has a profoundly important obligation to insure insofar as possible that a majority of bona fide party members is able to nominate the candidates it wishes without interference resulting from organized efforts to subvert the party's nominating procedures. Consequently, the District Court analyzed the Texas Election Code's restrictions on the signing of minority party nominating petitions almost entirely in terms of the State's legitimate interest in preserving the integrity of the primary election process against vote fraud:

> "The Courts recognize a state's compelling interest to preserve the integrity of its election process. Under the Texas scheme a voter may exercise the franchise by voting in the primaries or by attending a minority party convention. 'He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in Baker v. Carr,

> [369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)].' Several Courts have found that a state has an interest in preventing 'raiding,' whereby members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. So long as these 'anti-raiding' provisions are narrowly drawn, as in the challenged Texas provision, the right of disaffected voters to associate in a new political party is not unduly burdened." 349 F. Supp. at 1280 (footnotes omitted).

The fundamental defect implicit in this analysis is open and obvious: under the Texas system, an individual who signs a minority party nominating petition is not *voting* for a candidate. Not only is one who signs a nominating petition completely free to vote for any opposing candidate or slate of candidates in the succeeding general election; more importantly, he is not engaged in the process of *excluding* competitors for the same office as he would be if he were participating in a party primary election or nominating convention. Of course, there is no question that Texas may legitimately seek to insure that only bona fide party members are permitted to select a slate of candidates by choosing among those who have filed for particular offices,[13] and it has done so by providing that a voter who helps to select one party's candidates may not thereafter influence the course of any other party's nominating processes by participating in its primary election or nominating convention. But the *additional* prohibition against signing a nominating petition plainly does not further the same goal. Rather than determining who the minority party's candidates will be, voters who sign such pe-

[13] *Rosario v. Rockefeller*, 41 U.S. L.W. 4401, March 21, 1973; *Lippitt v. Cipollone*, 404 U.S. 1032, 92 S. Ct. 729, 30 L. Ed. 2d 725 (1972), *affirming* 337 F. Supp. 1405 (N.D. Ohio, 1971).

titions have done nothing more than indicate their desire that the names of such candidates as are ultimately selected by the party will appear on the general election ballot. Since the purposes served by signatures on nominating petitions are entirely distinct from those served by participation in the procedures by which party nominees or policies are ultimately determined, the analogy between this prohibition and those truly designed to prevent "raiding" and similar concerted efforts to undermine an opposition party is a false one, simply because the petition — unlike the primary election or the party convention — is not in any sense a part of the candidate selection process.

Obviously, if enough minority party members voluntarily decided to relinquish their opportunity to participate meaningfully in party affairs, they might conceivably forego the party conventions and cast a spurious block vote in a major party primary for the purpose of nominating the weaker candidates. However, even apart from the fiction implicit in any assumption that bona fide minority party members will renounce all participation in an organizational structure needing every available participant in order to survive as a viable entity, the obvious answer to this objection is that *precisely* this alternative has traditionally been available to the members of the "minority" Republican Party in Texas, who by voting in the Democratic primary are nevertheless perfectly free to switch their allegiance to the Republican nominees in the general election. The point is that the restrictions on the circulation of minority party nominating petitions imposed by the Texas Election Code effectuate no *further* protection for the integrity of the primary electoral process beyond that accomplished by the general pro-

scription against participation in the primaries or conventions of more than one party. Rather than discouraging cross-over voting, "raiding" and similar practices, such restrictions do nothing more than impose an irrational limitation upon the number of available signatures, none of which can be secured until after most of the electorate has already committed itself to an irrevocable, all-or-nothing choice.

And this is plainly the essence of the constitutional vice that infects the Texas system: a member of an established political party must support all of the party's prospective nominees, to the exclusion of all others, or he may support none of them. If one minority candidate appeals to him (or, perhaps as important, if one of his own party's nominees does *not* appeal to him), he can do nothing to help promote the individuals of his choice in the most effective way possible — that is, by joining together with others who would likewise desire to see the names of alternative candidates on the general election ballot in order to accomplish that result. By thus conditioning access to ballot position upon party rather than individual loyalties, the State has in effect imposed an arbitrary barrier to effective political association in violation of the First Amendment and a party member's right to dissent from the choice of a nominee of which he disapproves. Since "all political ideas cannot and should not be channeled into the programs of our two major parties," *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957), meaningful political action is necessarily contingent upon a fair opportunity to lend simultaneous support and allegiance to candidacies cutting across formal party lines. The Texas Election Code stifles that diversity for no apparent reason whatever.

Of course, if signing a minority party nominating petition were in any sense equivalent to voting in a party primary election or participating in a party convention — that is, if signing could be equated with the processes by which prospective nominees are accepted or rejected, party policy formulated, and the future course of party affairs determined — the District Court's reasoning would have persuasive force, particularly in light of *Rosario v. Rockefeller, supra.* The State may legitimately stop a voter from helping to determine the nominees of two different parties or from participating in the internal affairs of more than one party, but only because such dual participation engenders fraud and endangers the integrity of the entire nominating process. Such considerations are absent when the question is merely whether or not the names of minority party candidates will appear on the general election ballot. In these circumstances an arbitrary prohibition against manifesting support for the candidates of more than one political party accomplishes nothing more than suppression of constitutional rights under a superficially deceptive claim that legitimate State interests are being promoted. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock,* 361 U.S. 516, 523, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960).

CONCLUSION

For the foregoing reasons, the Appellants respectfully urge that the judgment of the District Court should be reversed insofar as it upholds the constitutionality of the totality of the restrictions imposed on minority party candidacy by the Texas

Election Code, including those which limit signatures on minority party nominating petitions, and that the District Court should be directed to enter an order enjoining the enforcement and application of these provisions against the Appellants.

Respectfully submitted,

MICHAEL ANTHONY MANESS,
711 Main Street, Suite 700,
Houston, Texas 77002,
(713) 229-8681,

GERALD M. BIRNBERG,
2020 Southwest Freeway, Suite 302,
Houston, Texas 77006,
(713) 529-7648,

Counsel for the Texas New Party and Texas Socialist Workers Party

CERTIFICATE OF SERVICE

I, Michael Anthony Maness, a member of the Bar of the Supreme Court of the United States and counsel of record for the Appellants Texas New Party and Texas Socialist Workers Party, hereby certify that on the 5th day of May, 1973, I have caused to be mailed three copies of the foregoing brief to other counsel of record at the following addresses: Mr. Sam L. Jones, Jr., Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711; Mrs. Gloria T. Svanas, Attorney at Law, 418 West Fourth Street, Odessa, Texas 79761; Mr. Laurel N. Dunn, 2811 Old Robinson Road, Waco, Texas 76700; and Mr. Robert W. Hainsworth, Attorney at Law, 3710 Holman Avenue, Houston, Texas 77004. I further certify that all parties required to be served have been served.

MICHAEL ANTHONY MANESS

APPENDIX

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIVIL RIGHTS ACT OF 1871

42 § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Art. 13.02 Nominated at primary

On primary election day in 1952 and every two (2) years thereafter, candidates for Governor and for all other State offices to be chosen by vote of the entire State, and candidates

for Congress and all district offices to be chosen by the vote of any district comprising more than one (1) county, to be nominated by each organized political party that cast two hundred thousand (200,000) votes or more for governor at the last general election, shall, together with all candidates for offices to be filed by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 180.

Art. 13.03 Date of primary

The first Saturday in May of 1960, and every two (2) years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party at any primary election for an office unless he has complied with every requirement of all laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections for all candidates for such office. If at the general primary election for any political party, no candidate becomes the nominee for any office under this Article, a second primary election shall be held by such political party on the first Saturday in June succeeding such general primary election, and only the name of the two (2) candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot as candidates for such office at such second primary, except as herein stated, provided that in case no one received a majority in the first primary and if the second and third highest candidates in that race shall be tied these two (2) shall cast lots under the direction of the county chairman or state chairman as the case may be to see which of the two (2) shall have his name printed on the second primary ballots. The second primary election shall be conducted according to the law prescribed for

conducting the general primary election and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations, except where provided for by law. All precincts in the same county and all counties in the same district shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town shall be made not less than thirty (30) days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them. Acts 1951, 52nd Leg., p. 1097, ch. 462, art. 181; Acts 1959, 56th Leg., p. 335, ch. 165, § 1.

Art. 13.12 Application for place on ballot

The application to have the name of any person affiliating with any party placed on the official ballot for a general primary as a candidate for the nomination of such party for any office for which a nomination may be made at such primary shall be governed by the following:

1. Such application shall be in writing, indicating the office for which nomination is sought and whether for a full term or for an unexpired term, signed and duly acknowledged by the person desiring such nomination, or by twenty-five qualified voters. It shall state the occupation, county of residence, and post-office address of such person, and if made by him shall also state his age. If the application is made by qualified voters, there shall be endorsed on the application or filed in a separate instrument, before the deadline for filing applications, a state-

ment signed by the candidate showing his consent to such candidacy.

2. The application shall be filed with the state chairman in the case if statewide offices, with the county chairman of each county which is included wholly or partially within the district in the case of district offices, and with the county chairman of the particular county in the case of county and precinct offices; provided, however, that applications of candidates for justice of the court of civil appeals shall be filed with the state chairman. Except as provided in Paragraph 2a of this section, the application shall be filed not later than 6 p.m. on the first Monday in February preceding such primary.

Subsec. 2 amended by Acts 1967, 60th Leg., p. 1912, ch. 723, § 45, eff. Aug. 28, 1967; Acts 1969, 61st Leg., p. 2662, ch. 878, § 30, eff. Sept. 1, 1969.

Art. 13.45 Nominations by parties under two hundred thousand votes

Subdivision 1. Parties receiving more than two percent of vote for governor. Any political party whose nominee for Governor in the last preceding general election received as many as two percent of the total votes cast for Governor and less than two hundred thousand votes, may nominate candidates for the general election by primary elections held in accordance with the rules provided in this code for the primary elections of parties whose candidate for Governor received two hundred thousand or more votes at the last general election; or such party may nominate candidates for the general election by conventions as provided in Sections 224 and 225 of this code.[1]

Subdivision 2. Parties receiving less than two percent of vote for governor. Any political party whose nominee for governor received less than two percent of the total votes cast for governor

[1] Articles 13.47 and 13.48.

in the last preceding general election, or any new party, or any previously existing party which did not have a nominee for governor in the last preceding general election, may also nominate candidates by conventions as provided in Sections 224 and 225,[1] but in order to have the names of its nominees printed on the general election ballot there must be filed with the secretary of state, within 20 days after the date for holding the party's state convention, the list of participants in precinct conventions held by the party in accordance with Sections 222a and 224 of this code,[2] signed and certified by the temporary chairman of each respective precinct convention, listing the names, addresses (including street address or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions in an aggregate number of at least one percent of the total votes cast for governor at the last preceding general election; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election. The address and registration certificate number of each signer shall be shown on the petition. No person who, during that voting year, has voted at any primary election or participated in any convention of any other party shall be eligible to sign the petition. To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: "I know the contents of the foregoing petition, requesting that the names of the nominees of the ..... Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during

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[2] Articles 13.45a and 13.47.

the current voting year I have not voted in any primary election or participated in any convention held by any other political party." The petition may be in multiple parts. One certificate of the officer administering the oath may be so made as to apply to all to whom it was administered. The petition may not be circulated for signatures until after the date set by Section 181 of this code for the general primary election. Any signatures obtained on or before that date are void. Any person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year is guilty of a misdemeanor and upon conviction shall be fined not less than $100 nor more than $500.

The chairman of the state executive committee shall be responsible for forwarding the precinct lists and petition to the secretary of state.

At the time the secretary of state makes his certifications to the county clerks as provided in Section 3 of this code,[3] he shall also certify to the county clerks the names of parties subject to this subdivision which have complied with its requirements, and the county clerks shall not place on the ballot the names of any nominees of such a party which have been certified directly to them unless the secretary of state certifies that the party has complied with these requirements."

Amended by Acts 1967, 60th Leg. p. 1921, ch. 723, § 59, eff. Aug. 28, 1967. Subd. 2 amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 35, eff. Sept. 1, 1969.

Art. 13.47 Conventions of parties not required to hold primary

Political parties which are not required by law to make nominations by primary election may make nominations by conventions as provided herein.

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[3] Article 1.03.

Nominations for statewide offices shall be made at a state convention, which shall be held on the second Saturday in June of the election year, and which shall be composed of delegates selected in the various counties at county conventions held on the second Saturday in May. The county conventions shall be composed of delegates from the general election precincts of such counties elected therein at precinct conventions held in such precincts on the first Saturday in May.

Nominations for district offices of districts composed of more than one county or part thereof shall be made at district conventions held on the third Saturday in May of the election year, composed of delegates elected thereto from the counties having territory within the district, at the county conventions held on the second Saturday in May.

Nominations for county and precinct offices and for district offices of districts composed of only one county or part of one county shall be made at the county conventions held on the second Saturday in May.

The state executive committee of each party shall determine the formula by which the number of delegates to the county, district, and state conventions of that party shall be governed, and shall also formulate such rules as it deems desirable with respect to participation of delegates at a county convention in the nomination of candidates for precinct offices and for district offices of districts composed of only a part of the county, and in the election of delegates to a district convention where only a part of the county is included in the district.

Amended by Acts 1967, 60th Leg., p. 1923, ch. 723, § 61, eff. Aug. 28, 1967.

Art. 13.47a Application for nomination; affidavit of intent to run; filing

Sec. 1. No person shall be nominated by any state, district,

or county convention held pursuant to Articles 222, 223 and 224[1] of this Code unless he has filed with the chairman of the appropriate executive committee an application requesting that his name be placed before the convention as a candidate for nomination. The application shall conform to the requirements of Article 190 of this Code (Article 13.12, Election Code, Vernon's Texas Civil Statutes), and shall be filed in the same manner and within the time prescribed by that Article, except that it shall request that the candidate's name be placed before the convention instead of requesting that his name be placed on the general primary ballot.

Sec. 2. A person who has been nominated by a convention may decline the nomination, but he shall not be eligible for nomination by that party to any other office to be voted on at the same election except as a candidate for an unexpired term where the vacancy in office occurred subsequent to the date of the convention at which he was originally nominated.

Sec. 3. As a condition precedent to having a candidate's name printed on the official ballot under Article 227 or Article 230[2] of this Code, there must, in addition to the requirements of those two (2) Articles, be filed, with the person with whom the written application must, thereunder, be filed, an affidavit, duly acknowledged by the person desiring his name to be placed on the ballot stating his occupation, county of residence, post office address, age, and the office for which he intends to run. The affidavit must be filed at the same time requests under Article 190 of this Code must be filed.

Sec. 4. The requirements of Sections 1 and 3 shall not apply to candidates for unexpired terms where the vacancy in office occurs subsequent to the tenth day preceding the regular deadline for filing applications for a place on a primary election ballot as prescribed in Paragraph 2 of Section 190 of this

code.[4] The requirements of Section 3 shall not apply to independent candidates for any office for which the filing deadline in a primary election is extended under the provisions of Paragraph 2a of Section 190 of this code.

Sec. 4 amended by Acts 1967, 60th Leg., p. 1924, ch. 723, § 61a, eff. Aug. 28, 1967.

[4] Article 13.12.